88-1537

No. _____

Supreme Court, U.S.
FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LANCE H. MORTENSEN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LANCE MORTENSEN
P.O. Box 12344
Pensacola, FL 32581
(904) 438-4806

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

40 pp

QUESTIONS PRESENTED FOR REVIEW

I. Did the Trial Court err by continuing defendant's consent to trial before a magistrate after a mistrial and by denying defendant's request to withdraw his waiver of his right to trial by an Article III judge?

II. Did the Trial Court err in admitting defendant's testimony from a proceeding that ended in mistrial, when such testimony was compelled by evidence the admissibility of which was never subjected to appellate review?

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LANCE H. MORTENSEN,

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UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION

Petitioner Lance H. Mortensen respectfully prays that this court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 4, 1988.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Mortensen* is reported at 860 F.2d 948 (1988). That opinion affirmed the unreported decision of the United States District Court for the Western District of Washington (Tacoma).

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on November 4, 1988. Rehearing was sought and denied on January 17, 1989. This petition was filed within 60 days of that time and is timely. The Supreme Court has jurisdiction to review the judgement in this case by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, ARTICLE III § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at states Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

No person . . . shall be compelled in any criminal case to be a witness against himself; . . .

18 U.S.C. § 3401(b)

Any person charged with a minor offense may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial before a judge of the district court and that he may have a right to trial by jury before such judge and shall not proceed to try the case unless the defendant, after such ex-

planation, signs a written consent to be tried before the magistrate that specifically waives both a trial before a judge of the district court and any right to trial by jury that he may have.

MAGISTRATE RULE 2(b)

Upon the defendant's appearance . . . [t]he magistrate shall also explain to the defendant that he has a right to trial before a judge of the district court . . .

STATEMENT OF THE CASE[1]

In 1985, Lance Mortensen was charged with four counts of willful failure to file a tax return under 26 U.S.C. § 7203. He consented to trial before a magistrate as provided by 18 U.S.C. § 3401(b). During that trial, defense counsel raised several objections to the admissibility of evidence. The evidence was admitted over objection, and Mortensen took the stand to refute that evidence. The jury failed to reach a verdict in the first trial, and a mistrial was declared. A retrial was scheduled.

Mortensen did not consent to trial before a magistrate in the second trial; rather, the magistrate relied on the consent from the previous mistrial. Before jury selection in the second trial, Mortensen moved to withdraw his consent to trial before a magistrate. [Tr. at ___ ; See App. E] This motion was denied by a district judge, and the case was returned to the magistrate for trial. [Tr. at ___; See App. E]

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[1] Except where otherwise indicated, all facts in this Statement may be found in the Facts section of the Court of Appeals' decision, 860 F.2d at ___ .

At the second trial, defense counsel again objected to the admission of evidence. Several of the magistrate's evidentiary rulings differed from those in the first trial [Tr. at 702-03]. If the rulings in the second trial were correct, then the rulings at the first trial must have been incorrect.

Mortensen did not take the stand at the second trial. Nevertheless, the prosecutor introduced his first trial testimony into evidence over the objection of Mortensen's counsel.

At his second trial, Mortensen was convicted and sentenced to one year imprisonment and a $4,000 fine. The United States District Court for the Western District of Washington affirmed the decision, as did the United States Court of Appeals for the Ninth Circuit. From this decision, Petitioner requests a writ of certiorari.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IMPINGES ON THE RIGHT TO BE TRIED BEFORE AN ARTICLE III JUDGE BY HOLDING THAT A CONSENT TO TRIAL BEFORE A MAGISTRATE CONTINUES AFTER A MISTRIAL.

The judicial power of the United States is vested in judges with life tenure and protection from diminution of salary. Article III §1. Such judges are known as Article III judges. Parties to a federal case or controversy are entitled to have their cause determined by an Article III judge. *United States v. Dobey*, 751 F.2d 1140, 1142-43 (10th Cir. 1985), *cert den'd*, 474 U.S. 818. *Cf. Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). However, Congress has provided that a criminal defendant in a misde-

meanor case may waive his right to trial by an Article III judge if he gives informed, written consent. 18 U.S.C. § 3401 (b).

In his initial trial, Mortensen consented to trial before a magistrate. That initial trial ended in a mistrial when the jury failed to reach a verdict. Mortensen never renewed his consent to trial before a magistrate. In fact, he sought to withdraw that consent before a jury was chosen for the second trial. Thus, the issue in this case is whether consent under 18 U.S.C. §3401 (b) continues after a mistrial, and if so, whether that consent may be withdrawn before a jury is selected in the new trial.

No case has yet addressed the specific question whether consent to trial before a magistrate continues after a mistrial. However, in *United States v. Lee*, 539 F.2d 606 (1976), the sixth circuit attempted to distinguish situations in which consent continued from those in which it did not. In *Lee*, the defendant waived his rights to trial by jury and trial before an Article III judge. Lee was convicted, and appealed the decision. The district court remanded the case for further findings, and Lee tried to withdraw his consent. The sixth circuit held that under these circumstances, Lee did not waive his right to trial before an Article III judge in the retrial. The *Lee* court said:

> "We think that if Lee is to be deemed to have waived these two constitutional rights for an unlimited number of retrials, his intentions should be evidenced by more than just his signature on a printed form, particularized only by the typed addition of his name, the number of the case, the district

court, the charge, and the magistrate's name." *Id.* at 609.

The court of appeals in the case at bar, addressing the *Lee* case, suggested that a mistrial is not the sort of situation which terminates consent. The court of appeals overstates the dictum in *Lee*. The *Lee* court suggested that a motion for new trial might not terminate consent, relying on a liberal construction of F.R.Crim.P. 33 and Magistrates Rule 7. An appeal, on the other hand, certainly would terminate consent. The *Lee* court never addressed the mistrial situation. Further, the *Lee* court's reference to new trials is pure dicta, as that situation was not presented by the case.

The issue of consent surviving a mistrial has been dealt with in the analogous situation of waiver of the right to trial by jury. In *United States v. Lutz*, 420 F.2d 414 (3d Cir. 1970), the prosecution and defense waived the right to trial by jury in the first trial. This trial ended in a mistrial. At the second trial, the prosecution refused to waive the right to trial by jury, and a trial by jury was conducted. The third circuit held that, "[o]nce a mistrial was declared, each party was free to assert or waive his rights." *Id.* at 416. Thus, the consent to trial without jury terminated upon the mistrial. Notably, the *Lee* court was aware of the *Lutz* decision, cited it, [*Lee*, ~~539~~ F.2d at 610] and did not distinguish it from the Article III judge waiver situation in *Lee*.

Even if consent was not automatically terminated by the mistrial, consent was clearly terminated by Mortensen's motion to withdraw consent. Mortensen moved to withdraw his consent to trial by magistrate before jury selection began in the second trial. The

district court heard the motion, and denied it. Given the importance of the right to trial by an Article III judge, discussed above, Mortensen should have been permitted to withdraw his consent at that time.

Because Mortensen's right to trial before an Article III judge was limited by this decision, this court should grant the petition.

II. THE DECISION OF THE COURT OF APPEALS IMPINGES ON A FUNDAMENTAL CONSTITUTIONAL RIGHT, THE PRIVILEGE AGAINST SELF-INCRIMINATION, BY PRESUMING WITHOUT ANALYZING THE RECORD THAT TESTIMONY IN THE INITIAL MISTRIAL WAS NOT COERCED.

The Fifth Amendment privilege against self-incrimination is a fundamental element of our constitutional liberty. While this privilege can be waived, it can only be waived with free and voluntary consent. *Miranda v. Arizona*, 384 U.S. 436 (1966). A person may not be coerced into giving up this right, neither by physical force, *see, e.g., Sims v. Georgia*, 389 U.S. 404 (1967), nor by psychological pressure, *see, e.g., Garrity v. State of New Jersey*, 385 U.S. 493 (1967) (threat of removal from public office); *Lynumn v. State of Illinois*, 372 U.S. 528 (1962) (threatened to take away child, cut off welfare rights).

This Honorable Court has recognized that it is also possible to coerce a defendant into waiving his privilege against self-incrimination by admitting improper evidence. *Harrison v. United States*, 392 U.S. 219 (1967). In *Harrison*, wrongfully obtained evidence was admitted in the first trial, and the defendant chose to testify to refute that evidence. On appeal, the case was reversed and remanded because of the improper admission of evidence. At the second trial, the

defendant chose not to testify. The prosecution tried to introduce the defendant's first trial testimony. This Court held that the first trial testimony was inadmissible unless the Government could prove that the defendant's first trial testimony was not coerced by the improperly admitted evidence. This court recently reiterated the *Harrison* holding in *Oregon v. Elstad*, 470 U.S. 298, 316-17 (1984).

Many courts have applied the *Harrison* decision, but no court has ever considered the application of the *Harrison* doctrine to a mistrial situation. After a mistrial, the trial court's evidentiary rulings are not subjected to appellate scrutiny. Accordingly, the record does not indicate whether these rulings were improper and potentially coercive.

The trial court and the court of appeals in this case presumed, without analyzing the record, that Mortensen's first trial testimony was uncoerced. The courts never considered whether the evidentiary rulings in the first trial were proper. Rather, the court of appeals stated that "Mortensen must demonstrate . . . that illegally obtained and improperly admitted evidence compelled his testimony in the prior trial." *United States v. Mortensen*, 860 F.2d 948, ___(1988). This contradicts *Harrison*, which placed the burden on the Government. This court stated, "the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used . . . Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, *the Government must show* that its illegal action *did not* induce his testimony." Harrison, 392 U.S. at 224. (Emphasis added; footnotes omitted).

Notably, the facts of this case strongly suggest that Mortensen's first trial testimony was coerced by improperly admitted evidence. The record indicates that Mortensen testified at his first trial, though not at his second. The magistrate's evidentiary rulings in the second trial differed from those in the first [Tr. at 702-03]. Thus, it appears that the difference in rulings changed Mortensen's decision whether to testify. If the first trial rulings were improper, then the Government must show that the improper evidence did not coerce Mortensen's testimony.

Yet Mortensen never had the opportunity to challenge the evidentiary rulings in the first trial. The rulings were presumed proper, even though they were different from rulings in the second trial. Where, as here, the Government wishes to introduce testimony from a prior mistrial, the defendant should have the opportunity to challenge the voluntariness of his testimony on appeal. Because Mortensen was denied that opportunity, this petition should be granted.

CONCLUSION

The decision of the court of appeals severely limits certain important constitutional rights, specifically, the right to be tried by an Article III judge and the privilege against self-incrimination. Mortensen's consent to trial before a magistrate should have terminated upon his mistrial. If that consent did not automatically terminate, then he should have been permitted to withdraw his consent upon motion before jury selection began. Furthermore, Mortensen's testimony from the first trial should not have been admitted in the second trial without appellate review of the evidentiary rulings which may have compelled his

testimony. These are important issues impinging directly on fundamental rights. Accordingly, this court should grant Mortensen's petition for writ of certiorari and hear this case.

Respectfully Submitted

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LANCE H. MORTENSEN, *Defendant-Appellant.*	No. 87-3072 D.C. No. CR-85-0046-JET OPINION

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted
September 12, 1988—Seattle, Washington

Filed November 4, 1988

Before: Eugene A. Wright, J. Clifford Wallace and Procter Hug, Jr., Circuit Judges.

Opinion by Judge Hug

SUMMARY

Criminal Procedure

Affirming a conviction and sentence, the court held that a defendant is entitled to withdraw in a timely manner his consent to trial before a magistrate.

After two jury trials before a U.S. Magistrate, appellant Lance Mortensen was convicted and sentenced for tax eva-

sion. Mortensen appeals the district court order affirming his conviction and sentence. He presents two issues on appeal: (1) whether he should have been allowed to withdraw his consent to trial before the magistrate after his first trial ended in a mistrial, and (2) whether the magistrate erred in admitting into evidence on retrial the testimony Mortensen gave during the first trial.

[1] The rule developed by the Sixth Circuit is that so long as the jurisdiction of the trial court is not broken by the taking of an appeal, the consent continues through subsequent proceedings. This court finds this rule reasonable. [2] The continuity of consent, however, is only a presumption. Consent can be withdrawn by the defendant if done in a timely manner. Like the waiver of some other constitutional rights, it should not, once uttered, be deemed forever binding. A party who consents to trial before a magistrate is entitled to withdrawal. [3] A withdrawal motion is timely when granting the motion would not unduly interfere with or delay the proceedings. [4] Mortensen's motion to withdraw, however, clearly failed to satisfy the timeliness requirement. [5] A defendant's testimony in a prior trial is normally admissible in subsequent proceedings. Mortensen offers no concrete examples of allegedly deficient evidence and no explanation of the legal errors allegedly made by the magistrate.

COUNSEL

Scott McLarty, Attorney at Law, Athens, Georgia, for the defendant-appellant.

Robert H. Westinghouse, Assistant United States Attorney and Milton J. Carter, Jr., Special Assistant United States Attorney, Seattle, Washington, for the plaintiff-appellee.

OPINION

HUG, Circuit Judge:

After two jury trials before the U.S. Magistrate for the Western District of Washington, Lance H. Mortensen was convicted and sentenced for tax evasion. Mortensen appeals the district court order affirming his conviction and sentence. He presents two issues on appeal: (1) whether he should have been allowed to withdraw his consent to trial before the magistrate after his first trial ended in a mistrial, and (2) whether the magistrate erred in admitting into evidence on retrial the testimony Mortensen gave during the first trial. We hold that a defendant is entitled to withdraw in a timely manner his consent to trial before a magistrate. Because we find that Mortensen's withdrawal motion was not timely and that his evidence claim is meritless, we affirm the district court order.

FACTS

In 1985, Mortensen was charged with four counts of tax evasion under 26 U.S.C. § 7203. He consented in writing to trial before a magistrate as provided by 18 U.S.C. § 3401(b). His first jury trial ended in a mistrial on December 7, 1985, after the jury failed to reach a unanimous verdict. The magistrate scheduled a retrial. On the morning of the retrial, April 21, 1986, Mortensen moved to withdraw his consent to trial before the magistrate. The magistrate transferred the proceedings to the district court for a ruling on the motion. The district judge denied the motion and returned the case to the magistrate for trial. Mortensen then made an emergency interlocutory appeal to this court, which was denied. On April 22, 1986, Mortensen's second jury trial began and ended some time later in his conviction. On July 30, 1986, the magistrate sentenced Mortensen to one year of imprisonment and imposed a $4,000 fine. Mortensen appealed immediately to this court. We returned the appeal to its proper forum, the district court. On June 25, 1987, the district court affirmed

the conviction and sentence. Mortensen now appeals this order.

STANDARD OF REVIEW

Because this appeal involves questions of federal law alone, we conduct a *de novo* review of the issues presented. *In re Bialac*, 712 F.2d 426, 429 (9th Cir. 1983).

JURISDICTION

Before discussing the merits of Mortensen's contentions, a jurisdictional issue requires some attention. We note that Mortensen failed to file his notice of appeal within the 10-day period established by Rule 4(b), Fed. R. App. P. Rule 4(b) requires that "[i]n a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from .... A judgment or order is entered ... when it is entered in the criminal docket." Compliance with Rule 4(b) is, of course, both mandatory and jurisdictional. *United States v. Eccles*, 850 F.2d 1357, 1363 (9th Cir. 1988). The district court issued its order on June 25, 1987; the clerk of the court entered the order on June 26, 1987. Under the 10-day rule, Mortensen had until July 6, 1987, to file the notice of appeal. He did not file the notice until July 7, 1987.

In a criminal case, failure to file a notice of appeal within Rule 4(b)'s 10-day period is not necessarily a fatal mistake. Rule 4(b) also provides

> Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

When a defendant in a criminal case has filed a notice of appeal after the 10-day period, but within the 30-day period in which the district court could have extended the time for filing, this court will remand to the district court to allow the appellant to make a showing of excusable neglect even though the defendant did not file a motion for extension within the 30-day period. If a proper showing of excusable neglect is made, the district court may rule that an extension of time, not to exceed 30 days, is appropriate. Upon a ruling by the district court that such an extension of time is appropriate, a notice of appeal filed within that extension period is deemed timely. *United States v. Stolarz*, 547 F.2d 108, 111-12 (9th Cir. 1976). We retain jurisdiction pending the district court's determination on remand and postpone ruling on whether the appeal was timely. *Id.* at 112. In this case, we discovered that the filing of the notice of appeal occurred after the 10-day period. On November 13, 1987, a prior panel of this court ordered a remand to the district court for an extension ruling. Mortensen moved on December 9, 1987, for an extension of 30 days on grounds of excusable neglect. The district court found excusable neglect and granted the motion on December 23, 1987. Consequently, we hold that the appeal was timely under Rule 4(b). We thus have jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

1. *Withdrawal of Consent*

Mortensen claims that the mistrial ended the vitality of his consent to trial before a magistrate. He contends that the magistrate and district judge improperly denied him the opportunity to withdraw.

[1] We hold that consent to trial before a magistrate is not automatically cancelled by a mistrial but continues in force until it is revoked or withdrawn in a timely fashion. Although our circuit has not directly addressed this issue, the Sixth Cir-

cuit has confronted the withdrawal question. In *United States v. Lee,* 539 F.2d 606 (6th Cir. 1976), the Sixth Circuit discussed two situations involving withdrawal of consent. One situation dealt with withdrawal following an order for a second trial after appellate review of the magistrate's decision. In that context, the *Lee* court held that consent could not be deemed to continue after the first trial. *Lee,* 539 F.2d at 608-09. The other situation dealt with withdrawal after the magistrate had ordered a second trial without the intervention of an appellate court. In that case, the *Lee* court decided that "it appears appropriate to hold that waiver of a jury trial or consent to trial by a magistrate should continue in force." *Id.* at 608. The rule developed in *Lee* states, in other words, that so long as the jurisdiction of the trial court is not broken by the taking of an appeal, the consent continues through subsequent proceedings. We find this rule reasonable.

[2] The continuity of consent, however, is only a presumption. Although jurisdiction might remain unbroken, consent can be withdrawn by the defendant if done in a timely manner. Waiver of the right to trial before an Article III judge involves important constitutional rights. *See United States v. Dobey,* 751 F.2d 1140, 1142-43 (10th Cir. 1985), *cert. denied,* 474 U.S. 818 (1985) (applying to criminal cases the Ninth Circuit's civil case holding in *Pacemaker Diagnostic Clinic of America v. Instromedix,* 725 F.2d 537, 541 (9th Cir. 1984)(en banc), *cert. denied,* 469 U.S. 824 (1984), "that parties to a case or controversy in a federal forum are entitled to have the cause determined by Article III judges"). Like the waiver of some other constitutional rights, it should not, once uttered, be deemed forever binding. Our circuit has held, for example, that once a waiver of the right to counsel has been made, a defendant is entitled to withdraw the waiver and ask for an attorney in a later proceeding. *United States v. Kennard,* 799 F.2d 556 (9th Cir. 1986). Another court has held that waiver of the right to a jury trial can be withdrawn before a retrial of the same case. *United States v. Groth,* 682 F.2d 578, 580 (6th Cir. 1982). We believe that a party who consents to

trial before a magistrate is entitled to the same chance for withdrawal.

[3] We require only that the notice of withdrawal be timely. Timeliness is not a concept subject to precise quantification. The circumstances of each individual case determine its contours. In accord with a well-established tradition, we hold that a withdrawal motion is timely when granting the motion would not unduly interfere with or delay the proceedings. *Cf. Arnold v. United States*, 414 F.2d 1056, 1059 n.1 (9th Cir. 1969), *cert. denied* 396 U.S. 1021 (1970); Annotation, *Withdrawal of waiver of right to jury trial in criminal case*, 46 A.L.R. 2d 922-25 (1956).

[4] Mortensen's motion to withdraw clearly failed to satisfy the timeliness requirement. He waited to file the motion until the morning on which the retrial was scheduled to begin, with a jury panel called and waiting in the courthouse. Behavior of this sort seems intentionally calculated to cause delay and interference. Prior to the retrial date, Mortensen gave every indication that he anticipated retrial before the magistrate. Mortensen allowed without objection the scheduling of a new hearing before the magistrate; he set a date for the submission of pretrial motions to the magistrate; he submitted a material witness warrant that explicitly referred to retrial before the magistrate; he filed with the magistrate a motion to dismiss that did not express a change in his consent status; he sought and received a continuance from the magistrate. These actions demonstrate that Mortensen continued to consent to trial before the magistrate up to the very morning the trial was to begin. In light of these factors, we conclude that Mortensen's withdrawal motion was untimely and therefore properly denied.

2. *Admission of Testimony*

Mortensen argues that the magistrate improperly admitted into evidence on retrial Mortensen's testimony during the

first trial. Citing *Harrison v. United States*, 392 U.S. 219 (1968), Mortensen claims that he had a right to appellate review of the circumstances surrounding his taking of the stand during his first trial before admission of his testimony in the second trial. He contends that, because the mistrial does not constitute a final judgment, no appellate review of his evidentiary objections was possible.

[5] Mortensen's reliance on *Harrison* is misplaced. A defendant's testimony in a prior trial is normally admissible in subsequent proceedings. *Harrison* states that an exception to this rule arises when the defendant's prior testimony was compelled by the need to counter evidence that was illegally obtained and improperly admitted. *Harrison*, 392 US. at 222-23. Although Mortensen vigorously asserts that illegally obtained and improperly admitted evidence compelled his testimony, he offers no concrete examples of the allegedly deficient evidence and no explanation of the legal errors allegedly made by the magistrate. Instead, Mortensen asks this court to create a new rule that would extend *Harrison* to proceedings that are non-final. This extension far exceeds *Harrison*'s teachings. In order to establish that the *Harrison* exception applies, Mortensen must demonstrate, on this appeal of his ultimate conviction, that illegally obtained and improperly admitted evidence compelled his testimony in the prior trial. He has failed to so so.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-3072
D.C. No. CR-85-0046-JET

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LANCE H. MORTENSEN,
Defendant-Appellant.

FILED
JAN 17 1989

ORDER

Appeal from the United States District Court
for the Western District of Washington

Before: WRIGHT, WALLACE and HUG, Circuit Judges.

The petition for rehearing is DENIED.

APPENDIX C

IN THE UNITED DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. CR85-46T

UNITED STATES OF AMERICA,

Plaintiff

-vs-

LANCE H. MORTENSEN,

Defendant.

FILED JUN 20 1987

ORDER

THIS MATTER comes on before the above-entitled Court upon Defendant's Appeal from the Magistrate's Judgment and Sentence entered on July 25, 1986.

Having considered the entirety of the records and file herein, it is now

ORDERED that Magistrate's Judgment and Sentence, entered on July 25, 1986, is hereby AFFIRMED.

The clerk of the court is instructed to send uncertified copies of this order to the defendant and to all parties of record.

DATED this 25th day of JUNE, 1987.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. CR85-46T

UNITED STATES OF AMERICA,

Plaintiff,

v.

LANCE H. MORTENSEN,

Defendant.

FILED JUL 30 1986

JUDGMENT AND COMMITMENT

On July 25, 1986 came the attorney for the Government and the defendant appeared in person and with his counsel, Scott McLarty.

IT IS ADJUDGED that the defendant upon his plea of NOT GUILTY, and a jury verdict of GUILTY, has been convicted of the offense of violations of Title 26, United States Code, Section 7203, as charged in the Amended Information, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on Count I that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of ONE (1) YEAR, and fined the sum of $2,000;

IT IS ADJUDGED that on Count II that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of ONE (1) YEAR, and fined the sum of $2,000.

Said sentence on Count II, to run concurrently with the sentence imposed on Count I.

IT IS ADJUDGED as to Count III that the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of FIVE (5) YEARS, upon the following terms and conditions:

1. That he comply with all local, State, and Federal laws;

2. That he comply with the rules and regulations of the Probation Department;

3. That he file all tax returns and pay all taxes, penalties, and interest thereon due and owing to the United States; and

4. File all tax returns and pay all taxes to become due during the period of probation.

IT IS ADJUDGED as to Count IV that the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of FIVE (5) YEARS, upon the following terms and conditions:

1. That he comply with all local, State, and Federal laws;

2. That he comply with the rules and regulations of the Probation Department;

3. That he file all tax returns and pay all taxes, penalties, and interest thereon due and owing to the United States; and

4. File all tax returns and pay all taxes to become due during the period of probation.

The period of probation on Count IV is to run concurrently to that imposed on Count III, and will commence upon defendant's release from imprisonment.

The Court recommends that the defendant be allowed to self-report to the designated institution for imprisonment.

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Franklin D. Burgess
UNITED STATES MAGISTRATE

Presented by:

/s/ Robert H. Westinghouse
ROBERT H. WESTINGHOUSE
Assistant United States Attorney

APPENDIX E

RELEVANT EXCERPTS FROM THE TRIAL TRANSCRIPT

* * * *

MR. WESTINGHOUSE: Your Honor, for the record, I would simply indicate I am Robert Westinghouse, appearing on behalf of the United States, together with Joseph Carter, who has just stepped out of the court for a moment. We are ready to proceed, Your Honor.

THE COURT: All right.

MR. McLARTY: If Your Honor, please, for reasons that I will be glad to provide to the Court, should the Court desire, the Defendant in this case takes the following positions, in order: First of all, that a consent to trial before Magistrate issued in the first case does not apply after a mistrial is granted. We start on ground one, and there has not been a consent to trial before Magistrate.

Secondly, in the event the Court should rule that that is not appropriate, we would then request that our consent be allowed to be withdrawn, and, thirdly, we would raise the constitutional question, regardless of how the Court might rule on those two matters, that a trial of this matter must go before an Article 3 Judge, and we would rely on the 9th Circuit Case, United States vs. Woodley, which can be found at 726 F.2d 1328, a copy of which I have here. I have shared it with Mr. Westinghouse, and I will be glad to share it with the Court at this time.

Should the Court request any reasons as to the substance of this decision or the timing of it, I will be willing to provide it.

THE COURT: All right. I would like to hear from you in a minute.

MR. McLARTY: Your Honor, at the previous trial in this case, we have, since that previous trial, filed a motion to dismiss on double jeopardy grounds and a motion in limine to restrict irrelevant and prejudicial evidence.

At the previous trial in this matter, quite a few piece of evidence were admitted which, upon reflection and restraint in going through the record and checking with what I consider to be experts in the area of evidence, there is unanimous opinion that the Court applied the incorrect standard in deciding those and, as a result, a great deal of extraneous evidence that had nothing to do, whatsoever, with the Defendant's guilt or innocence was admitted in this court.

Quite often, the record reflects, the Court initially would rule in the Defendant's favor and then upon the continued behest of Mr. Westinghouse that he could not appeal your decision, the Court would go along with Mr. Westinghouse.

This culimated with the final jury instructions. The entire defense, which we presented, was on a good faith misunderstanding of the law. The Court originally had an appropriate instruction on good faith misunderstanding of the law. Upon the pleas and begging of Mr. Westinghouse, the Court then went back and came up with another charge on willfulness that did not charge at all on the misunderstanding of the law, but it did say that they jury may consider whether or not the Defendent's belief is reasonable, and that goes against the weight of authority, not only in the other circuits, but in the 9th Circuit, itself.

Upon investigation of the rules, I discovered that should the Court, and I would assume that the Court would apply the same rules in subsequent trials as it did in the first trial, there would likely be a conviction. Should there be a conviction, the Defendent would then have to deal with the issue of bail pending appeal. The way that I read the rules, that would be presented to you first and then would have to be reviewed by the District Court before we could

get into the 9th Circuit Court of Appeals. As such, the Defendant could serve a substantial amount of time prior to his obtaining the relief to which he would be entitled, in my professional opinion, assuming the rulings were the same as they were before.

I wish to make it clear that I hold absolutely no belief that the Court was malicious or that the Court acted in bad faith. Quite the contrary, the Court had the patience of Job in the previous trial, and this Counsel, particularly, appreciates it.

However, in light of what I consider to be unprofessional conduct by Mr. Westinghouse and the Court's inclination to accept his begging and cajoling after making clear rulings for the Defendant and then reversing those decisions, it appears that we would have to be trying this case not only against the United States Attorney, but also against the Court. It is not in my client's best interests, and I believe he is entitled to a trial before an Article 3 Judge, and, for that reason, we would insist upon it. Thank you, Your Honor.

THE COURT: Aside from those things that have been raised, you are prepared for trial; is that correct?

MR. McLARTY: That is correct, Your Honor.

THE COURT: Mr. Westinghouse?

MR. WESTINGHOUSE: Your Honor, I think the timing of the motion is extremely regretful, particularly if it results in a delay in the conduct of the trial. We are certainly prepared to go forward either before this Court or before the District Court.

THE COURT: This is something I did not expect this morning. Obviously, I thought I had made it clear in my correspondence and through my clerk that the matter would be set for trial today, and I intended for it to go. In fact, I cleared the whole week to make sure there would not be this kind of problem.

I do not know when this enlightment came about, Mr. McLarty. I am sure it came about sooner than today. In any event, the Court was just informed today.

What I am going to do is this: I want all parties to these proceedings to readjourn down in Judge Tanner's courtroom. As of now, the jury is here and ready to, the court reporter is here, and I am pretty sure we will get this case started today. All parties to this matter will go one flight down, this end of the hall.

MR. McLARTY: May I inquire before whom this case would be?

THE COURT: Judge Tanner.

MR. McLARTY: Fine, Your Honor.

MR. WESTINGHOUSE: Thank you, Your Honor.

(Pause in proceedings.)

THE CLERK: All rise. The United States District Court for the Western District of Washington is now in session, The Honorable Jack E. Tanner presiding.

THE COURT: You may be seated.

THE CLERK: The United States of America vs. Lance H. Mortensen, CR85-46T. Would the attorneys please come forward and identify yourselves for the record.

MR. WESTINGHOUSE: May it Please the Court, Robert Westinghouse and Joe Carter, appearing on behalf of the United States. The government is ready to proceed.

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THE COURT: Was it me?

MR. MORTENSEN: I believe it was you, sir, at the North Shore Country Club.

THE COURT: I do not remember every playing at the North Shore Country Club in my life.

MR. McLARTY: Then it certainly would not be relevant, Your Honor. I just wanted to point that out.

THE COURT: When was this?

MR. MORTENSEN: Twelve years ago, sir.

THE COURT: Me?

MR. MORTENSEN: I believe so.

MR. McLARTY: I just felt it was my obligation to disclose this to the Court.

THE COURT: Why is the matter here? It was not scheduled to be here.

MR. McLARTY: Your Honor, there were three prongs to the position that I took before Magistrate Burgess. First of all, following the mistrial which was declared in this case, I believe, in November of 1985, the Court never requested nor inquired with respect to consent to trial before the Magistrate.

THE COURT: The Court never requested it?

MR. McLARTY: No.

THE COURT: The Court cannot request it.

MR. McLARTY: It never suggested it; it never inquired.

THE COURT: It cannot.

MR. McLARTY: We took the position, Your Honor, that the consent did not carry over into the new trial. In the event that it did, we would move to withdraw it, and, additionally, Your Honor, I may have given a copy of this case to Judge Burgess. I believe I did. It is the case of The United States vs. Woodley, which holds rather strongly.

I think the Court, on its own, raised the issue of whether or not anything other than an Article 3 Judge can hear a case in which it is subject for an Article 3 Judge to hear. For that reason, the Defendant takes the position that he is entitled to a trial before an Article 3 Judge.

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MR. McLARTY: Only if there is a waiver of trial, the rule reads that "if the Defendant signs a written consent to be tried before the Magistrate which specifically waives trial before a Judge in the District Court, the Magistrate shall take the Defendant's plea.

If the Defendant pleads not guilty, the Magistrate shall either conduct the trial within 30 days upon the written consent of the Defendant or fix a later time for the trial, giving due regard to the needs of the parties to consult with Counsel and prepare for trial."

Nothing in here relates to trial before a jury. It can be interpreted that way. To the extent that that rule permits an usurpation of the Article 3 Judgment requirement of the United States Constitution, we would assert that such a rule is invalid and certainly under any circumstances, Your Honor, the Defendant should be able to withdraw a consent that he may have given to the extent that the Court rule—

THE COURT: Would that not make a mockery of the administration of justice, if that was true?

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MR. McLARTY: If, Your Honor, the Defendant, the first time, had waived a jury trial and been convicted and had it reversed on appeal or at a mistrial, upon the new trial he would be allowed to withdraw that waiver of a jury and get a jury. I do not think there is any question about that. This is a new case. It is a brand new case,

and we have not entered a consent to trial before a Magistrate on it. It is pure and simple.

I do not believe there is one file where we have consented to a trial before a Magistrate in this subsequent case.

THE COURT: The case has not been concluded.

MR. McLARTY: Your Honor, I think it was concluded upon the declaration of a mistrial. At that point, much like a conviction, there starts a brand new trial.

THE COURT: What is the distinction between trying before the Magistrate and trying before an Article 3 Judge on a mistrial or a retrial?

MR. McLARTY: I think it is the Defendant's choice. The Defendant has the right to insist on an Article 3 Judge. Before his trial, he did not choose to do that at the first trial. After having gone through the first trial and having seen the rulings that went on and the colloquy between the United States Attorney and the Magistrate, the Defendant has determined that he would likely obtain the same rulings upon a new trial and that based on those, he would likely be convicted because those would be erroneous rulings and erroneous instructions and he would also likely be denied bail pending appeal and he would not be able to get into the 9th Circuit to get that issue redetermined in a timely fashion.

I think these are perhaps somewhat paranoid views, but in light of what I saw in the first trial, I do not think it is paranoid at all. I think it is realistic.

THE COURT: If I understand you, there is no challenge to the rights of a jury before the Magistrate, a jury of 12 before the Magistrate.

MR. McLARTY: Your Honor, yes, there is, I am contending that Article 3 prohibits, even with the consent of the Defendant, a trial before the Magistrate in a criminal

case in which any kind of criminal sanctions, other than petty offenses, can be rendered.

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I wish the record to be clear that I am raising three issues. One is, Does it carry over from the first trial? The second issue is, If it does, may it be withdrawn? The third issue is, Is it constitutional, under any circumstances, to not permit the Defendant, up to the time of trial, to insist on a trial before an Article 3 Judge?

The validity of the original consent to trial is not challenged by this Defendant. We do not contest that the original consent was valid. Thank you, Your Honor.

THE COURT: I think that the issue is clear, that I think the notice of timeliness of the consent is to withdraw. It is not contested that the original consent to trial by jury before a Magistrate was valid. I just cannot see that notice was timely given.

If there is a question that would involve extraordinary reasons for the withdrawal, I do not think that the Defendant has presented that to this Court at this particular time. If there is an interlocutory appeal and it is successful, which means immediate, it seems to me that matter is very easy to handle. I am going to rule that there is no timeliness of withdrawal and you will be referred back to the Magistrate for trial.

If, for some reason, the matter is accepted by the 9th Circuit on an emergency of interlocutory appeal, this Court will be prepared to try this matter tomorrow afternoon at 1:30.

MR. McLARTY: If Your Honor Please, I would ask for a 24-hour to 48-hour continuance to seek an emergency interlocutory appeal.

THE COURT: That motion is denied. This matter will go to trial before the Magistrate commencing at 1:30. You

have had time, Counsel, to do whatever you had to do. I will allow you to be tried before the Magistrate at 1:30. If, for some reason, the 9th Circuit sees fit to stay it, pending the order of that Court, this matter can be taken up again in this Court at 1:30 tomorrow afternoon, either for further hearing on an appeal basis or for trial, either one. We will be prepared to handle it.

MR. McLARTY: Thank you, Your Honor.

MR. WESTINGHOUSE: Thank you, Your Honor.

(Pause in proceedings.)

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That, therefore, brings us to the need to determine from the Court the time for the Court Reporter to the present from the former trial to assist in the reading in of the testimony of Mr. Mortensen. We intend to put that forth, Your Honor. I am wondering if the Court would give us some indication as to whether the Court Reporter is necessary or whether we could do that through perhaps another IRS representative and allow Mr. Carter to read the questions and answers.

THE COURT: I understand what you are saying. Let me hear from Mr. McLarty in terms of what Mr. Westinghouse intends to do.

MR. McLARTY: Your Honor, first of all, I would object. I think it is admissible for the purposes of rebuttal. He has got a couple of cases that are distinguishable, but I have not had a chance, since he just gave me one of them this morning, to read through them as well as the cases that they rely on.

We naturally are taking the position that, of course, his testimony previously would be admissible for impeachment purposes, but not admissible because the cases that he is relying on, Your Honor, are cases where there was a ver-

dict rendered and a reversal based on an error that did not go to any material matter at the trial.

In this case, there was a mistrial. There has never been a determination and consistent with, what I think, Mr. Westinghouse's position is, the first trial never existed. I think that we need to relate this to, for instance, when a Defendant testifies in a motion to suppress hearing, it is not admissible at trial because he testified at that.

We are, first of all, going to take the position that it is not allowable. If the Court allows it, it is going to be over my objection, but we certainly would strenuously object to it being read by an IRS agent or a Governmental agent, because, as you know, the words certainly do not reflect the emotions, the feelings, or any of that and the inflictions could be misused so much, somehow we need to find a totally objective, if you are going to admit it, third party to read it.

I would say that that would be something the Government ought to be held away for rebuttal. They might find that it is a waste of time because of the way that we conducted the defense.

THE COURT: One last response, and then I am going to tell you how I am going to do this.

MR. WESTINGHOUSE: Your Honor, first, with respect to the legal question, we have provided the Court with copies of, I believe, a Superior Court decision in Harrison v. United States—

THE COURT: I do not think you need to dwell on that. I have read that.

MR. WESTINGHOUSE: Thank you, Your Honor. I believe it is clear, from those cases, that when a Defendant testifies, he waives his priviledge as to that testimony and it is admissible in any subsequent proceeding unless there is some taint that is determined to directly go to that

testimony. In this case, we have a stronger position that was considered by the Supreme Court in Harrison.

In Harrison, as the Court will recall, I am sure, there was an argument that the earlier confessions of—

THE COURT: I understand your position. I have read the case. I think I understand what it stands for. I think I understand the distinction that Mr. McLarty is making in terms of a hung jury as opposed to it coming in some other way.

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"A Defendant who chooses to testify, waives his priviledge against compulsory self-incrimination with respect to the testimony he gives and that waiver is no less effective or complete because the Defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him."

The Harrison Court went on to reverse the Harrison conviction because what forced him to take the stand was the admission of illegal confessions and matters of that nature.

In Nell, on the other hand, Nell was appealed and was reversed not only on the evidentiary ground, but rather on the fact that there was a problem with preemptory challenges and it was reversed for that reason only which did not go to the lawfulness of the evidence. So it is clear, from reading those cases and all of the cases that I can find under Shephard's, that the key determination is whether or not the Defendant took the stand as a result of lawfulness evidence against him or whether there was some problem with it.

As Your Honor recalls from the previous trial, there were numerous objections to the Court's evidentiary rulings, some of which, quite frankly, have been changed in

this trial. The Court has made different rulings at this trial. The problem I see is one of due process and Sixth Amendment and Fifth Amendment rights of Lance Mortensen because this situation is distinguished from all of the cases Mr. Westinghouse can find. This is a case of first impression.

Here the Government seeks to introduce it without there being the appellate determination of whether or not the evidence that was introduced against the Defendant was lawful evidence or not. Therefore, we submit, first of all, that absent that appellate review, clearly it is inadmissible. We would suggest that one of two positions should be taken by the Court.

Either the evidence would be inadmissible because to do otherwise would be to force him to again testify without there being a determination beyond Your Honor of the lawfulness of the evidence that was presented against him.